90-386

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

RONALD F. KEITH,

Petitioner,

v.

EDWARD C. ALDRIDGE, Jr.,
Secretary of the Air Force,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the recognized exception to the doctrine of *res judicata* permits a plaintiff, who during negotiations leading to settlement of an earlier suit obtains the defendant's agreement to sever certain claims from the list of those covered by the settlement and release, to file a subsequent suit based on the severed claims?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Ronald F. Keith, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 9, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (Appendix A) is reported at 900 F.2d 736 (4th Cir. 1990). The district court's decision (Appendix B) is unreported.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 9, 1990, and Petitioner's Statement for rehearing *en banc* was denied on May 7, 1990 (Appendix C). This Court on July 23, 1990 having extended until September 4, 1990 the time in which this Petition may be filed, jurisdiction is hereby invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner was a civilian employee of the United States Air Force. In March 1987, petitioner filed suit in United States District Court for the Eastern District of Virginia (*Keith* I) alleging that respondent violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Privacy Act, 5 U.S.C. § 552a, when petitioner was terminated from his employment.[1] On the eve of trial, the district court dismissed the action with prejudice based upon a settlement agreement entered into by the parties after extensive negotiations.[2]

The original draft agreement submitted by respondent to petitioner for his signature was as broad as the doctrine of *res judicata* permitted. Paragraph 1 of respondent's draft agreement provided that it constituted a release of the respondent from liability for all claims "that were brought or could have been brought against [the Air Force] pursuant to Title VII, the provisions of the Privacy Act, the United States Constitution and relevant statutes and regulations." 900 F.2d at 738; App. at 3a. Similarly, paragraph 4 of respondent's draft provided that it constituted a

> full and complete disposition of all allegations filed or that could have been filed by [petitioner] under the provisions of Title VII, the Privacy Act, the United States Constitution, and relevant federal statutes and regulations and of any claim or allegation derived therefrom or related thereto.

Id.; App. at 3a.

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[1] Petitioner believed that he had been terminated by the Air Force because he represented minority employees alleging discrimination in their employment under Title VII. In connection with the administrative appeal of his termination, petitioner requested under the Privacy Act that the Air Force provide him with all notes maintained on him by his supervisors. The Air Force denied that such notes existed. *Keith* I thus stated claims under Title VII, on the motivation for petitioner's termination, and the Privacy Act, based on the failure of the Air Force to produce the notes in response to petitioner's request. At the time he filed *Keith* I, petitioner relied upon respondent's repeated protestations that the records he was seeking simply did not exist.

[2] At the close of discovery in *Keith* I, the Air Force produced for petitioner a stack of notes maintained on him by his immediate supervisor, which respondent admitted served as the basis for the charges against petitioner which resulted in his termination.

Petitioner refused to sign the draft agreement as submitted to him by respondent. In response to petitioner's objections to the scope of the claims covered by the settlement, the agreement was more narrowly drawn. As finally signed by the parties and submitted to the district court, paragraph 1 of the agreement provided that it released respondent from liability *only* for all claims that "were filed or that could have been filed . . . and that were brought or could have been brought against [respondent] *pursuant to Title VII and the Privacy Act.*" 900 F.2d at 739 (emphasis added); App. at 3a. Similarly, paragraph 4 was revised to limit the agreement *solely* to a disposition "of all allegations that were filed or that could have been filed by the [petitioner] *under the provisions of Title VII and the Privacy Act.*" *Id.* (emphasis added); App. at 3a. Even more importantly, the final agreement signed by the parties contained a further limiting clause:

> As this is a settlement of disputed claims, the settlement or any matters related to it shall have no precedential value and this agreement shall not be used *except to establish settlement of all matters related to plaintiff's claims and release of the defendant from all claims filed or that could have been filed by plaintiff concerning this action, pursuant to Title VII and the Privacy Act.*

Id. (emphasis added); App. at 3a.

Subsequently, petitioner filed the instant action (*Keith* II), alleging that the manner in which respondent had processed his termination had violated petitioner's Fifth Amendment due process rights.[3] The limitations in the settlement agreement notwithstanding, the district

[3] Because petitioner was a federal employee who could be dismissed only "for cause", 5 U.S.C. § 7513(a), the procedures under which he was dismissed had to comport with the Fifth Amendment's guarantee of due process. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 538-39 (White, J.), 552 (Brennan, J., concurring) (1985). Under the procedures made available to federal employees by Congress, a civilian employee who has been terminated by his agency is entitled to a trial-type hearing on his termination before the Merit Systems Protection Board. 5 U.S.C. §7701. Air Force regulations provide that all material relied upon by the Air Force to support the termination of a civilian employee be made available to the employee, and that any information in any form that is not made available to the employee "cannot be used to support the reasons for the action." Air Force Regulation 40-750, ¶27. Similarly, the Merit Systems Protection Board requires agencies to disclose to

(continued. . .)

court held that *Keith* II was barred by application of *res judicata*. The district court did not address petitioner's argument that the parties' agreement constituted an exception to *res judicata*.

The court of appeals affirmed, holding that while the parties' expressed intent was to settle only petitioner's Title VII and Privacy Act claims, their unspoken intent[4] in the agreement was to "close the book on Keith's employment with the Air Force." 900 F.2d at 741; App. at 7a. The court arrived at this conclusion by interpreting petitioner's agreement not to "apply for further employment with the Air Force" to mean that he "would not in any way attempt to *obtain* future employment with the Air Force." 900 F.2d at 741 (emphasis added); App. at 7a-8a.[5] In support of this conclusion, the court cited an affidavit submitted by one of the attorneys who negotiated the agreement for the Air Force.[6]

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[3] (. . . continued)

an appellant all information relied upon when the action was taken against him. These rights are separate and distinct from petitioner's Privacy Act right, asserted in *Keith* I, to access records maintained about him by respondent.

When the supervisory notes were disclosed to petitioner during *Keith* I, petitioner learned that the notes had also been made available to the agency counsel who represented the Air Force during petitioner's hearing before the Merit Systems Protection Board, but had been deliberately withheld from petitioner. Petitioner alleged in *Keith* II that respondent's denial to him of these notes under these circumstances deprived him of due process during his only hearing on the merits of his termination. There is no question but that petitioner would have stated his constitutional claim in *Keith* I had the existence of these notes not been fraudulently concealed from him at the time the first suit was filed.

[4] Because the court of appeals was reviewing the district court's grant of summary judgment to the respondent, it is unclear how the court could resolve "as a matter of law", 900 F.2d at 741; App. at 7a, what it termed the contested issue of the parties' unspoken intent with respect to the agreement.

[5] The court held that petitioner's requested relief of reinstatement was inconsistent with this agreement.

[6] Reliance on the affidavit was error, however, for the agreement provides that it "constitutes the entire agreement between the parties" and "supersedes all previous communications, representations, or agreements, either verbal or written, between the parties". *See Blackledge v. Allison*, 431 U.S. 63, 75 n.6 (1971) ("the parol evidence rule has as its very purpose the exclusion of evidence designed to repudiate provisions in a written integration of a contract").

Finally, although the settlement reflected the parties' agreement to narrow the claims precluded, the court found that the absence of an express reservation of petitioner's right to maintain the claims in *Keith* II manifest the parties' intent to preclude any future litigation of those claims. *Id.* at 742; App. at 8a.

In so holding, thereby barring petitioner from raising his constitutional claims in *Keith* II, the court of appeals has contravened settled law in at least two respects. Firstly, the court of appeals has disregarded entirely a line of decisions of this Court which holds that a settlement agreement, as a consent decree, "must be construed as it is written, and not as it might have been written". *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959); *Hughes v. United States*, 342 U.S. 353, 356-58 (1952). The court of appeals was not free, under the guise of implementing its view of the "intent of the parties", to expand the agreement's limitation of the claims subject to *res judicata* to include claims which the parties expressly agreed to exclude.

Secondly, by demanding as a predicate for *Keith* II an express reservation in the agreement of petitioner's right to raise his constitutional claims, the court has disregarded the modern recognition in the Restatements of Judgments and Torts that parties who release specified claims need not expressly reserve others to preserve them.

REASONS FOR GRANTING THE PETITION

1. Dismissal of *Keith* II on *res judicata* grounds violates this Court's clear authority mandating that the intent of the parties be determined from the four corners of their agreement.

The court of appeals dismissed petitioner's constitutional claims in *Keith* II on the asserted ground that they were barred by the settlement agreement in *Keith* I through application of *res judicata*. In finding that the parties intended their settlement agreement to preclude the constitutional claims, the plain language of the agreement to the contrary notwithstanding, the court violated the fundamental principle that the parties' intent is to be ascertained from the four corners of their agreement.

Res judicata precludes a party to a civil action from raising in a subsequent suit claims which were or could have been brought at the time of the earlier suit. *Montana v. United States*, 440 U.S. 147, 153 (1979). The doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

Because *res judicata* is a defense which can be waived by the parties, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4403 at 12 (1981 ed.), the law recognizes an exception to the doctrine based upon the parties' agreement. *See id.* § 4415 (1981 ed.). Such an agreement need not be expressed; rather, the Restatement codifies an exception to the application of *res judicata* when the parties agree "in terms *or effect* that the plaintiff may split his claim, or the defendant has acquiesced therein." Restatement (Second) of Judgments § 26(1)(a) (1982) (emphasis added). Because the primary purpose of *res judicata* is to protect the defendant from multiple law suits involving the same claims, the defendant's agreement, "in express words *or otherwise*", that certain claims may be severed bars him from invoking the doctrine of claim preclusion as a defense to the subsequent suit. *Id.*, comment a (emphasis added).

The narrowing of the scope of the agreement to address only the Title VII and Privacy Act claims raised in *Keith* I reflects the parties' intent and should have been honored by the courts below. Other courts of appeals have regularly permitted a subsequent suit when the parties have executed a limited agreement or release in the manner demonstrated here. *See Torres v. Rebarchak*, 814 F.2d 1219, 1223-26 (7th Cir. 1987) (permitting subsequent suit on damage claims when consent judgment dismissed equitable claims "with prejudice" and damage claims "without prejudice"); *Prestin v. Mobil Oil Corp.*, 741 F.2d 268, 273 n.6 (9th Cir. 1984) (stipulated dismissal of state court claims which did not foreclose litigation of issues pending in federal court did not bar litigation of federal claims); *Continental Bank & Trust Co. v. American Bonding Co.*, 605 F.2d 1049, 1056-57 (8th Cir. 1979) ("a release which is confined by its terms to claims or demands arising out of a specific matter will be restrained in its effect to the purposes of the bargain"). *See also Ballam v. United States*, 552 F.Supp. 390, 393 (D.S.C. 1982) (release executed by plaintiff for all

damages to his land in connection with the construction and maintenance of a waterway did not bar a subsequent claim against the United States based on erosion), *rev'd on other grounds*, 747 F.2d 915 (4th Cir. 1984), *vacated and transferred to the Federal Circuit*, 474 U.S. 1078 (1986), *rev'd on other grounds*, 806 F.2d 1017 (Fed.Cir. 1986).

There can be no principled judicial purpose to disregarding the plain language of the agreement negotiated by the parties in this case. On the contrary, conferring on the Air Force the benefit of a bargain it could not obtain in direct negotiation with petitioner will "serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation." Restatement (Second) of Judgments § 27, comment e (1982). Indeed, "one sure way to discourage voluntary settlements is . . . to read into contracts things which are simply not expressed or not there." *Texas Eastern Transmission Corp. v. Federal Power Comm'n*, 306 F.2d 345, 348 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963).

Although the court of appeals recognized the exception to *res judicata* where the parties so agree, it held that, the language in the agreement to the contrary notwithstanding, the parties had not agreed to sever the constitutional claims from the Privacy Act and Title VII claims. Rather, the court inferred the parties' intent to preclude any future litigation over petitioner's employment, based upon an affidavit from the Air Force attorney who negotiated the agreement for his client.

This Court has held on numerous occasions, and in varying contexts, that the intent of the parties to an agreement must be found "within its four corners". *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).[7] In *Armour*, a consent decree prohibited meatpackers, including Armour, from "engaging in or carrying on" commerce in certain food product lines. When the Greyhound Corporation, which operated two retail food businesses, acquired Armour, the Government claimed that the acquisition violated the consent decree, which the Government asserted mandated a complete separation

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[7] For purposes of claim preclusion, a stipulation of settlement has the same effect as a consent decree. *Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383 (9th Cir. 1978).

between the meatpackers and the retail food business. The Court, however, rejected that argument, finding that the lack of a prohibition against the "acquisition" of Armour by another company was the clearest indication that the parties did not intend such a prohibition. *Id.* at 678-80. "[L]anguage that would have been apt either to create a complete separation or to bar with particularity the sort of transaction involved here was not used", *id.* at 680; "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Id.* at 682.

In *Hughes v. United States*, 342 U.S. 353, 357 (1952), the Court refused to interpret a decree permitting the defendant the option of selling his stock or putting it in trust as requiring him to sell it within a reasonable time, even though the Government argued that such an interpretation would more nearly effectuate the intent of the parties. In *United States v. Atlantic Refining Co.*, 360 U.S. 19, 22-23 (1959), the Court rejected the Government's request for an order limiting the payment of certain dividends under a decree which allowed for dividends to be computed according to a specified formula, finding that such an interpretation would "substantially chang[e] the terms of a decree to which the parties consented".

Because consent decrees and settlement agreements "have many of the attributes of contracts, they should be construed basically as contracts". *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 (1975). Thus, while resort to aids to construction of technical or ambiguous terms may be necessary, *id.*, absent such terms the agreement should be interpreted "not upon an expedient construct of what the parties are thought to have intended, but upon the explicit provisions to which the parties have agreed." *Id.* at 247 (Stewart, J., dissenting).

The court of appeals has completely distorted these straightforward principles. What the parties in this case intended is evident from their bargaining and the final agreement. There is no question but that the parties could not agree to a document purporting to preclude petitioner from raising his constitutional claims, so they eliminated all language to that effect and narrowed the agreement to exclude the constitutional claims from its scope. As it is written, the

agreement settling *Keith* I expressly states that it applies *solely* to the Title VII and Privacy Act claims raised in *Keith* I.

Similarly, there is no principled basis from which the court could substitute the agreement's prohibition of petitioner's ability to "apply" for future employment with its own prohibition against his using this litigation to "obtain" employment. The words are sufficiently different, and have meanings sufficiently distinct, to assume that the parties would have used the word "obtain" if they actually meant "obtain", but used the word "apply" because that is what they intended.[8] The court of appeals cannot be permitted, consistently with *Armour*, to rewrite the agreement negotiated by the parties to suit the *post-haec* recognition of one of the parties that he might have chosen his terms differently. *See Nemaizer v. Baker*, 793 F.2d 58, 59-60 (2d Cir. 1986):

> The legal consequences of a stipulation incorporated in a court order may not be undone simply because, with the benefit of hindsight, stipulating turns out to be an unfortunate tactic.

There is absolutely no basis in fact or law for the court of appeals to interpret that agreement in such a way as to preclude petitioner's constitutional claims. The court of appeals' dismissal of *Keith* II on this basis is inconsistent with this Court's decisions in this area and should be reversed.

2. The decision of the court of appeals is inconsistent with the decisions of this court which do not require an express reservation of rights in order to preserve them.

The court of appeals held that petitioner's failure in the *Keith* I settlement agreement to expressly reserve his right to litigate his constitutional claims barred him from raising those claims. In that holding, which fails to cite any authority whatever in its support, the court has disregarded the well-settled law to the contrary.

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[8] A federal employee "applies" for a position by submitting a Standard Form 171. *Costner v. United States*, 665 F.2d 1016, 1019 (Ct.Cl. 1981). The Court may take judicial notice of the fact that one can "obtain" employment through means other than submitting an application.

The court found that the parties did not intend to permit petitioner to litigate his constitutional claims because their agreement did not expressly reserve those claims. Without question, however, the parties' negotiations, which resulted in the express removal of petitioner's constitutional claims from the list of those to which the agreement applied, constitutes sufficient evidence of the parties' intent for these purposes. Indeed, the court's interpretation of the agreement has rendered the negotiations meaningless, for it fails to address why the parties bothered at all to negotiate the exclusion of the constitutional claims from the preclusion provisions if the results were the same in any event. *See Consolidated Gas Supply Corp. v. F.E.R.C.*, 745 F.2d 281, 291 (4th Cir. 1984) ("It is a reasonable interpretation device to conclude that what someone has not said, someone has not meant").

There is simply no authority requiring an express waiver for purposes of *res judicata*. This Court abandoned almost 20 years ago the "ancient common-law rule" requiring an express reservation of rights in a release, on the ground it "frustrate[d] potential settlements, and thereby promote[d] litigation." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 347 (1971). Indeed, both the Restatement (Second) of Judgments and the Restatement (Second) of Torts recognize that rights in a release need not be expressly reserved in an agreement to save them. Restatement (Second) of Judgments § 26(a) and comment a (1982); Restatement (Second), Torts § 885(1) and comments a-d (1979).

Moreover, because the claims at stake are constitutional claims, the absence of an express reference to the claims in the preclusion and release portions of the agreement must be interpreted in favor of the petitioner. A waiver of constitutional claims must be intentional. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). While constitutional rights may be waived by contract, the waiver "must, at the least, be very clear". *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

Petitioner herein repeatedly and expressly struck from the respondent's draft of the agreement any implication that he would waive and release his constitutional claims; respondent clearly acquiesced. To now hold that petitioner has actually waived his constitu-

tional rights to due process, his negotiations aside, is to impose upon him a waiver which he would not voluntarily accept.

In sum, parties are free to resolve their disputes and to agree to any provisions within the limits of the law. It is the obligation of the courts to give effect to those agreements as exemplified by their language. To sanction the disregard of the plain language of the agreement as well as the negotiations leading to the agreement, as the courts below did in this case, is to discourage parties from settling their disputes before trial out of fear that they will then be denied the benefit of their bargain.

CONCLUSION

Petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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September 4, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2397

RONALD F. KEITH

Plaintiff - Appellant

v.

EDWARD C. ALDRIDGE, JR., in his official capacity as Secretary of the Air Force

Defendant - Appellee

PHILLIPS, Circuit Judge:

Ronald J. Keith appeals from the order of the district court dismissing his civil action against appellee (the Air Force) on res judicata grounds. Keith had filed a civil action in March 1987 alleging Title VII, *see* 42 U.S.C. § 2000e-3, and Privacy Act, *see* 5 U.S.C. § 552a, violations after the Air Fore terminated his employment (*Keith I*). That action was settled by agreement and dismissed with prejudice by the district court. Keith filed this second action (*Keith II*) in August 1988, alleging that the Air Force's failure to provide him with certain personnel notes violates his fifth amendment due process right. We agree with the district court that the judgment in *Keith I* precludes Keith from bringing this second action against the Air Force and therefore affirm.

Keith was employed as a civilian computer specialist by the Air Force from 1974-1986. The Air Force provided notice on May 16, 1986, that it intended to terminate him for disruptive misconduct in the work-place.[1] On May 18, Keith filed Freedom of Information Act

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[1] Specifically, Keith was charged with

> (1) making malicious and disparaging statements against fellow co-workers and supervisors with intent to harm, undermine or damage their reputation or official standing; (2) using offensive profanity within the workplace; and (3) disruptive, raucous conduct which interferes with office efficiency and productivity, and action in a manner likely to slow productivity within the office. Letter from Col. George E. Elsea, USAF, to Ronald F. Keith (May 16, 1986), Joint Appendix (J.A.) at 82.

(FOIA) and Privacy Act requests to obtain all records relating to his proposed dismissal. Keith specifically sought personal data and notes collected as part of the investigation that led to the decision to terminate his employment. The Air Force responded that personal notes kept by supervisors and remaining under the control of the originator were not subject to the Privacy Act. Pursuant to FOIA, the Air Force indicated that it had provided Keith with a copy of personal data collected as part of the investigation; it had no other personal notes in its records subject to FOIA disclosure.

On June 13, the Air Force terminated Keith. He filed an administrative appeal on June 16, challenging the Air Force's failure to disclose all requested personal and investigative notes. The appeal was returned without action on the ground that no such records existed. Keith then appealed his termination to the Merit Systems Protection Board (MSPB)[2]; both an administrative law Judge (ALJ) and the Board on review upheld the dismissal.

Keith I was filed on March 4, 1987. Keith charged that reprisals culminating in his dismissal were motivated by activity protected by Title VII of the Civil Rights Act of 1964.[3] He also alleged that the Air Force had violated the Privacy Act by failing to provide him with his supervisors' personal notes compiled and maintained as part of the investigation that led to his termination.[4] This failure allegedly deprived him of the opportunity to prepare a defense before the MSPB. He sought declaratory and injunctive relief respecting the challenged Air Force practices, release of the investigative records, general damages, reinstatement, back pay, costs, and attorney's fees. Keith eventually deposed Lt. Colonel Jack Stratford, his immediate supervisor, determined that Stratford had kept personal notes, and obtained

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[2] *See* 5 U.S.C. § 7701.

[3] In his complaint Keith alleged that "[t]he Air Force's removal of Mr. Keith was a reprisal against Mr. Keith for his having opposed both across-the-board institutionalized discriminatory employment practices and individual acts of discrimination by the Department of the Air Force." J.A. at 66.

[4] Keith also charged that the Air Force had violated the Privacy Act by utilizing specified performance evaluation forms and methods designed to test and measure certain personality traits. The final count in his complaint asserted a claim for infringement of first amendment rights.

a copy of the notes (Stratford notes) pursuant to a discovery request during the last week of scheduled discovery.

Serious settlement discussions ensued at this point, and the district court removed the case from the trial calendar. On December 1, 1987, the Air Force presented a draft settlement agreement. The agreement proposed would have released the Air Force from liability for all claims, except attorney's fees, "that were brought or could have been brought against the [Air Force] pursuant to the Title VII, the provisions of the Privacy Act, the United States Constitution and relevant federal statutes and regulations." J.A. at 38. Similarly, the agreement was proposed as a "full and complete disposition of all allegations filed or that could have been filed" under Title VII, the Privacy Act, the Constitution, and federal statutes and regulations; it was not to be used otherwise than to establish settlement of such claims. *Id.* at 41, 42. Under the draft agreement, Keith would have agreed not to "seek to obtain further employment" with the Air Force, ad the Air Force would not be required to consider him for hire, transfer, or reassignment. *Id.* at 40-41.

Keith apparently objected to the draft settlement agreement, and the agreement ultimately signed in January 1988 was more narrowly drawn. The Air Force was released from, and the agreement recognized as a full and complete disposition of, those claims "that were filed or that could have been filed (except attorney's fees) and that were brought or could have been brought against the [Air Force] pursuant to Title VII and the provisions of the Privacy Act." *Id.* at 77, 80. The agreement was not to be used except to establish "settlement of all matters related to [Keith's] claims and release of the [Air Force] from all claims filed or that could have been filed by [Keith] concerning this action, pursuant to Title VII and the Privacy Act." *Id.* at 80. Keith agreed not to "apply for further employment" with the Air Force and to dismissal of the suit with prejudice. *Id.* at 79, 80. The Air Force agreed to remit to Keith back pay, expunge his record, and pay reasonable attorney's fees. The district court, noting the settlement pursuant to agreement of the parties, dismissed *Keith I* in an order dated February 4, 1988, specifically reserving Keith's claim for attorney's fees.

Keith filed his second action on August 9, 1988. His amended complaint alleged that the Air Force's failure to provide him with the Stratford notes effectively denied him the right to respond and to raise defenses to the termination proceedings, thereby violating his fifth amendment due process right. Keith requested declaratory and injunctive relied respecting the Air Force's challenged conduct and "equitable relief" in the form of reinstatement, back pay, expungement of his record, costs, and attorney's fees. *Id.* at 109. The Air Force moved to dismiss or in the alternative for summary judgment; Keith responded and filed a cross-motion for summary judgment. At the conclusion of a hearing on the motions, the court granted the Air Force's motion and entered an order dismissing Keith's suit. The court held that res judicata precluded Keith from bringing the second action. Analyzing the case under traditional res judicata principles, the court found identity of the parties and a final judgment on the merits in the earlier action, *Keith I*. The court also found, under *Nash City Board of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981), identity of the claims in the two actions.

This appeal followed. As an initial matter, Keith argues that there is not identity of claims in his two actions, making res judicata inapplicable. Keith's principal contention, however, is that, even if the technical requirements of res judicata are met, it should not apply to preclude the second action because the parties' settlement agreement and the judgment in *Keith I* were limited to his Title VII and Privacy Act claims. We address each of these contentions in turn.

II

On this appeal we are reviewing the grant of summary judgment on res judicata grounds. In doing so, we apply the same summary judgment principles applicable in the district court, but are not bound to particular theories relied upon by that court. *See generally* 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil* § 2716 (1983). Our review therefore is essentially a plenary one on the summary judgment record before the district court. We observe at the outset that the federal law controls our assessment of the preclusive effect of the earlier federal judgment in *Keith I*. *See Harnett v. Billman*, 800 F.2d 1308, 1312-13 (4th Cir. 1986).

The requirements for invoking res judicata to preclude a subsequent law suit by bar or merger (claim preclusion) are familiar ones. "As applied, the essential elements of the doctrine are generally stated to be (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Nash City Bd. of Educ.*, 640 F.2d at 486. The critical element here is the second, identity of the causes of action in the two suits. There is no question that the judgment in *Keith I*, though a consent judgment, was, for claim preclusion purposes, a final one on the merits. *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4443 at 385 (1981) [hereinafter Wright, Miller, & Cooper].

Consistent with the modern trend, *see* 18 Wright, Miller & Cooper, § 4407; Restatement (Second) of Judgments § 24 (1982), we have adopted a transactional approach to the identity of claims question - "the appropriate iniquity is whether the new claim arises out of same transaction or series of transactions as the claim resolved by the prior judgment." *See, e.g., Harnett,* 800 F.2d at 1313. Applying this test, we agree with the district court's conclusion that the causes of action in the two actions are identical. The same series of connected transactions is involved in both actions: Keith's disruptive workplace behavior led to an internal investigation, Lt. Colonel Stratford kept notes to document Keith's behavior, the Air Force terminated Keith, he sought but was unable to obtain the notes prior to discovery during *Keith I*, and his administrative appeal of the termination was denied. At the root of both action is Keith's dismissal, the wrongful retention of the notes is challenged, under alternative Privacy Act (*Keith I*) and fifth amendment (*Keith II*) theories, and the same "operative facts" are at issue. *See* Restatement (Second) of Judgments § 24 comment b.

Keith's conclusory argument that the claims in his two actions do not meet this transactional test is without merit. He contends that the claims involved are not the same because *Keith I* was concerning with the validity of the Air Force's collection of information on employees and the motivation for his termination, whereas *Keith II* allegedly concerns only the conduct of his administrative hearing and its consistency with due process requirements. It is quite clear, however, that facts surrounding the making and the retention of the Stratford notes were critical to Keith's Privacy Act claim in the first

suit and to the due process claim in the second suit. Keith's argument does nothing to under mine the proper characterization of the events at issue in both suites as a series of connected transactions for res judicata purposes.[5] Thus unless an exception to the general rules of res judicata applies, the judgment in *Keith I* precludes Keith from bringing this second action against the Air Force.

III

The law does recognize an exception to the normal application of claim preclusion principles when the parties have agreed to the splitting of a single claim. "Express agreement" between the parties that litigation of one part of a claim will not preclude a second suit on another part of the same claim is normally honored by courts. *See* 18 Wright, Miller & Cooper, § 4415, at 124. The parties may be able to settle part of the claim only if another part is left free for later assertion. *See id.* The Restatement goes even further, recognizing an exception when the "parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein." Restatement (Second) of Judgments § 26((1)(a). Since a principal purpose of the general rule of res judicata is to protect the defendant from the burden of relitigating the same claim in different suits, consent, "in express words or otherwise," to the splitting of the claim prevents the defendant from invoking claim preclusion. *Id.* comment a.

When a consent judgment entered upon settlement by the parties of an earlier suit is invoked by a defendant as preclusive of a later action, the preclusive effect of the earlier judgment is determined by the intent of the parties. *See* 18 Wright, Miller, & Cooper, § 4443 at 384. *See generally* James, *Consent Judgments as Collateral Estoppel*, 108 U.Pa.L.Rev. 173 (1959). This approach, following from the contractual nature of consent judgment, dictates application of contract interpretation principles to determine the intent of the parties. If the parties intended to foreclose through agreement litigation of a claim, assertion of that claim in a later suit, whether or not formally

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[5] Keith emphasizes that he was unaware until the close of discovery in *Keith I* of the existence of the Stratford notes. For res judicata purposes, however, it is the existence of the claim, not awareness of it, that controls. *See Harnett*, 800 F.2d at 1313. If Keith is attempting to invoke the exception to this rile for fraud or concealment, *see* Restatement (Second) of Judgments § 26 comment j, we reject that attempt.

presented in the earlier action, is precluded. *See* 18 Wright, Miller, & Cooper, § 4443, at 3866-87. Claim preclusion will not apply, however, if the parties intended to settle only one part of a single claim and intended to leave another part open for future litigation. Although "[p]reclusion is most apt to be denied as to new claims that are found not to lie within the terms of the settlement," the parties' controlling intent may confirm that a consent judgement bars claims outside the four corners of the settlement agreement. *See* 18 Wright, Miller, & Cooper, § 4443, at 387.

We conclude as a matter of law that the parties in *Keith I* mutually manifested, their intentions, *see Restatement (Second) Contracts* § 2, comment b (1981), to settle not only the specific Privacy Act ad Title VII theories of liability alleged in that action, but also to preclude any future litigation having the objective of obtaining Keith's reemployment with the Air Force. We first note that the settlement agreement and the dismissal order entered pursuant to it do not expressly reserve to Keith the right to raise due process or other substantive claims in subsequent litigation. In contrast, both the agreement and the dismissal order expressly reserve Keith's claim for attorney's fees. Without question, Keith knew how to preserve a claim for future litigation, and he apparently persuaded the Air Force to limit their ability to assert res judicata against such a claim in a later suit.

The settlement agreement signed by the parties, fairly and objectively interpreted, manifests an intent to completely close the book on Keith's employment with the Air Force. The Air Force agreed to expunge Keith's record of all negative references, substitute his resignation for the removal action, and limit all requests for information regarding his employment to the expurgated personnel file. Back pay was carefully calculated and documented in the agreement. And the litigation itself was closed, with Keith agreeing to dismiss the case with prejudice and pay his own costs and the Air Force agreeing to pay reasonable attorney fees.

Keith thus negotiated substantial benefits in exchange for dismissing the first action, and he makes not claim that he has not secured the benefit of his bargain. As part of the bargain, he also agreed not to "apply for further employment" with the Air Force. Yet, the principal relief sought by Keith in this case that he did not obtain in

Keith I is reinstatement with the Air Force. The Air Force certainly believed that Keith was agreeing that he would not in any way attempt to obtain future employment with the Air Force. *See* J.A. at 99-100 (affidavit of Lt. Colonel Thomas Strand). Keith could have made clear in the agreement his reservation of the right to seek reemployment with the Air Force; the agreement itself evinces no such intent.

Keith argues, not without some force, that the changes between the draft agreement proposed by the Air Force and the agreement eventually signed indicate that the parties agree to settle *only* the Title VII and Privacy Act claims. We agree that the agreement signed is more narrowly drawn, and there is evidence in the record indicating that Keith's objections to some of the broad language in the draft agreement are reflected in the final document agreed to by the parties. In effect, he argues, the Air Force agreed to the splitting of the Title VII and Privacy Act claims from other claims arising out of his termination. Keith asks this court not to grant the Air Force the benefit of a bargain it could not obtain through negotiation in *Keith I*.

This argument by negative implication, however, ultimately fails. The Air Force expressed no clear consent to future litigation arising from the connected series of transactions involving Keith's termination. If Keith negotiated such consent, he should have made sure that the agreement reflected it. *See Harnett,* 800 F.2d at 1311 (settlement agreement in earlier suit permitted plaintiff to pursue state law claim in state court). Rather than expressly reserving Keith's right to bring a due process claim, or any other claim that might enable him to obtain reemployment with the Air Force, the agreement precludes Keith from applying for further employment. That the parties agreed to this language rather than language proposed by the Air Force does not indicate that they agreed that Keith was free in the future to seek reinstatement with the Air Force on different legal grounds. We thus remain unpersuaded by Keith's argument that the parties agreed to allow him to split his claim that relitigate under a different legal heading his attempt to gain reinstatement with the Air Force. *See Medina v. Wood River Pipeline Co.*, 809 F.2d 531, 534 (8th Cir. 1987).

IV

The order of the district court dismissing with prejudice *Keith I* was a final judgment on the merits for res judicata purposes and precludes Keith from bringing this action on the same claim against the same defendant, the Air Force.[6] We therefore affirm the judgment of the district court dismissing this action.

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[6] Because we hold that Keith was precluded from bringing this second action against the Air Force, we need not determine whether the district court would have jurisdiction to grant Keith all the relief he requested in this action. *See Hostetter v. United States*, 739 F.2d 983, 985 (4th Cir. 1984).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RONALD F. KEITH,	)	
Plaintiff,	)	
v.	)	**CA No. 88-1023-A**
EDWARD C. ALDRIDGE, Jr.,	)	
Secretary of the Air Force,	)	
Defendant.	)	

The above entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 10 a.m. on February 17, 1989, the following being the Judge's findings.

Before the Honorable James C. Cacheris, Presiding

United States District Judge

* * *

The settlement agreement relating in *Keith* I, which dismissed that action with prejudice, states in pertinent part that: The plaintiff releases and absolves the defendant of any and all liability arising from any and all claims that were filed or could have been filed and that were brought or could have been brought against the defendant pursuant to Title VII and the provisions of the Privacy Act.

The plaintiff argues that that language is limited merely to the Privacy Act and Title VII and not to the constitutional violations he seeks now.

The Fourth Circuit in *Adkins v. Allstate Insurance Company*, 729 F.2d 974, 976 (4th Cir. 1984), stated that:

> The Restatement of Judgments, Section 19 (1982) provides: a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

> In the comment that follows the rule, the draftsmen concisely explain its purpose: the rule that a defendant's judgment acts as a bar to a second action on the same claim is based largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end. These considerations may impose such a requirement even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of the opportunities to pursue his remedies in the first proceeding, or has deliberately flouted orders of the court.

Both the Supreme Court and this Circuit have consistently recognized the importance of these principles. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, discusses that.

The Fourth Circuit in *Nash City Board of Education v. Baltimore County*, 640 F.2d 484, 486 (4th Cir. 1981), stated that:

> The doctrine of res judicata is not a technical rule but a rule of fundamental and substantial justice, of public policy and private peace, which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. It is more than a judicially created doctrine of repose; it is a rule mandated by the full faith and credit clause of the Constitution, Article 4, Section 1, and its implementing statute, 28 U.S.C. § 1738, and should be applied accordingly.

Then the court when on to list the elements of the doctrine stating them to be:

(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits.

Elements (1) and (3) are obviously met in this case because there was a final judgment in *Keith* I. In every respect, the parties are identical, *Keith* I as in *Keith* II.

The question is now to determine the identity of the cause of action. The Fourth Circuit addressed that in *Nash*. Unfortunately, the authorities do not provide a precise, uniform definition of cause of action in connection with the application of res judicata. But, irrespective of which test is applied, however broad or narrow the definition, it is manifest that there be identity in cause of action between the former action and the present action.

In *Nash*, the Court found that suits which deal with the same subject matter, allege the same wrongful act, and which have the same operative facts are to be considered identical causes of action.

In the present case, *Keith* I and *Keith* II deal with the same subject matter, that being the dismissal of the plaintiff. Both cases allege the same wrongful act, that being the Privacy Act violations alleged in the previous case and the Fifth Amendment claim in the present case, as they deal with the failure to provide the plaintiff with Lt. col. Strafford's notes and the role the notes play in both cases.

Lastly, both cases are based upon the same operative facts. The two cases simply proceed on different theories. He is asking in essence for the same remedies in *Keith* II as he got in *Keith* I. Even though some additional proof would be necessary to provide the constitutional violation in *Keith* II, the facts presented in *Keith* I would necessarily have to be marshaled to meet plaintiff's burden in the current action. As such, I think the two causes of action are identical for res judicata purposes.

Here, he knew about the existence of the notes and he got them as apart of the pretrial process that are the basis of the action of this case. *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986), discusses actual knowledge of a potential claim is not a requirement for application of the rules of merger and bar, however; rather, the appropriate inquiry is whether the new claims arises out of the same transaction or series of transactions as the claim resolved by the prior judgment.

According to Restatement of Judgment, for purposes of res judicata, it's not necessary to ask if the plaintiff knew of his present claim at the time of the former judgment, for it is the existence of the present claim, not the party's awareness of it, that controls. This principle distinguishes from this case those cases where the challenged

claim did not exist at the time of the prior litigation, citing cases. In other words, in this case the claims are the same. I think the causes of action are the same. He was aware of the existence, going on different theories.

The Court finds that res judicata would bar, and I don't think anything that the *Brooks* case cited by plaintiff changes anything in the *Harnett v. Billman* case. I'm going to find the elements of res judicata set forth out of *Nash* have been met; that the final judgment in *Keith* I precludes plaintiff from proceeding any further in this case. So I'm going to grant the defendant's motion to dismiss or in the alternative for summary judgment, deny the plaintiff's motion. Exception is noted. Thank you.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RONALD F. KEITH,	)	
Plaintiff,	)	
v.	)	**CA No. 88-1023-A**
EDWARD C. ALDRIDGE, Jr., Secretary of the Air Force,	)	
Defendant.	)	

ORDER

For reasons stated in open court, it is accordingly ORDERED:

(1) plaintiff's Motion for Reconsideration is DENIED;

(2) that the Clerk shall forward copies of this Order to all counsel of record.

March 17, 1989

\s\ James C. Cacheris
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2397

RONALD F. KEITH **Filed: May 7, 1990**

Plaintiff - Appellant

v.

EDWARD C. ALDRIDGE, JR., in his official capacity as Secretary of the Air Force

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Murnaghan and Judge Young.